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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 1058

LILLIAN BLEWEISS SMITH,

Petitioner,

vs.

COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

(Opinion Below Appended)

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PETITION FOR WRIT OF CERTIORARI.

(Opinion Below Appended)

STATEMENT OF MATTER INVOLVED.

Based on diversity of citizenship, petitioner-plaintiff sued respondent-defendant in the United States District Court for the Northern District of Indiana on an accidental death policy on her husband (R. 2). From a judgment dismissing her complaint and refusing leave to amend (R. 62) she appealed to the Seventh Circuit Court of Appeals, which affirmed (R. 74-79). *Smith* v. *Commercial Travelers Mutual Accident Assn.* (C.C.A. 7), 158 F. (2d) 65.

Respondent-defendant is a New York insurance corporation doing business in Indiana (R. 74, 28). Insured was a resident of Pennsylvania when the policy was issued. He was injured and died in Georgia, and immediately after his burial the plaintiff widow came to live with relatives in Indiana, became a *bona fide* citizen of Indiana. *After plaintiff became an Indiana citizen* she furnished *proof of death* to defendant *from Indiana* and from there transacted all matters with defendant concerning the policy, including defendant's act of *sending its agent to plaintiff in Indiana* and there *executing* with her a written autopsy agreement which was a privilege given to defendant by the policy (R. 75-76, 35-37).

Defendant invoked, and the Circuit Court of Appeals enforced, a clause in the policy limiting actions to one year after the accident causing the death (R. 74, 76). Plaintiff sued after the year but less than two years after death, which was less than the statute of limitations of Indiana (R. 75).

Against this contractual limitation, plaintiff invoked the protection of an Indiana statute, *as previously construed by this Court,* and by the same Seventh Circuit Court of Appeals, and by the Indiana courts of last resort, to the effect a foreign insurance company doing business in Indiana, which is sued in Indiana by an Indiana citizen, is precluded of asserting a contractual limitation shorter than three years in an Indiana court (R. 76). She was denied protection of this statute in the decision of the Circuit Court of Appeals on the premise that "the policy had *matured* before it was in affected by the laws of Indiana * * * a contract of insurance *matures at death* * * *", and also on the further premise that Indiana is bound to enforce such a limitation clause in her own courts simply "*because* the contractual

limitation is valid in New York, the *locus contractus* * * *'' (Tr. 76).

Petitioner-plaintiff asserts (1) that the above first premise and ruling on the subject of *maturity* is in *direct conflict* with an Indiana Supreme Court decision rendered eleven days before the decision below, which was called to the attention of the court below but ignored, (2) even if the maturity premise be correct, plaintiff still is entitled to the benefit and protection of Indiana's three-year statute, *as construed by this Court* and by the Indiana courts of last resort, and (3) independently of (1) and (2) the above second premise erroneously extends the *comity* principle so far as to strip Indiana of all power to regulate the *remedial* subject of limitations in her own courts as against a contract on that subject made in another state.

Basis of This Court's Jurisdiction.

Jurisdiction exists under Title 28, Sec. 347 (a), Judicial Code, sec. 240, amended, giving this court jurisdiction to review "any" case by certiorari to a Circuit Court of Appeals.

Questions Presented.

1. Does the opinion below proceed on a false premise contrary to an Indiana Supreme Court decision rendered eleven days earlier, on the subject of when a cause of action "matures" on a policy? (R. 76).

2. Even if the premise be correct, does the decision *deprive* plaintiff of her rights as an Indiana *citizen* under this three-year statute *as construed by this Court* and the Indiana Supreme Court, and improperly *discriminate* against her as compared to other Indiana citizens? (R. 76).

3. A part from Nos. 1 and 2, should the decision lay down the rule of *comity* so broadly as to compel Indiana to enforce a contractual *remedy* which shortens the limitation period in her courts, simply "*because* the contractual limitation is valid in New York, the *loci contractus*," as held in the opinion below (R. 76, bottom), thereby stripping Indiana of all power to enforce her own public policy of protecting her citizens suing in her own courts, on the remedial subject of limitations?

Reasons Relied on for Allowance of Writ.

I.

The basic premise of the decision below is in *direct conflict* with an Indiana Supreme Court decision rendered eleven days earlier. The premise in the opinion below, dated November 19, 1946, is:

> "The policy had *matured* before it was in any way affected by the laws of Indiana * * * Plaintiff, however, insists that in her amended complaint, which the court did not permit to be filed, are allegations that the *notice of death and the proof of loss* which emanated *from Indiana* are conditions precedent to the accrual of the policy. We cannot agree with this reasoning. A contract of insurance *matures at death* and notice of death and filing proof of loss, while essential to the payment of claims, are necessarily subsequent to maturity." (Our emphasis).
>
> R. 76

The precedent, decided November 8, 1946, which was called to the attention of the court below and ignored (R. 84-88), lays down the law of Indiana on this subject

of *maturity* of a policy as follows, in *direct conflict* with the above ruling:

> "In the case at bar the appellant's (insurance company's) promise was 'upon receipt of due proof of death * * * to pay * * *.' *Not merely* the fact of *death* but the fact of *proof* of death, or waiver thereof prior to the filing of the complaint, were *necessary* to *mature* a cause of action." (Our emphasis).
>
> *Equitable Life Assurance Society* v. *Kelleman*, (Ind. Supreme, Nov. 8, 1946) 69 N. E. (2d) 244, 245, Par. 3

The policy in our case contains a provision substantially the same as the one above quoted:

> "Payment of benefits provided by Section A (death benefit, etc.) will be made within sixty days *after* receipt of due *proof* * * * Affirmative *proof* of loss *must* be furnished * * * " (R. 85, 42, 45).

II

Even if the above premise about maturity were correct, the decision *deprives* plaintiff of her rights as an Indiana *citizen* and improperly *discriminates* against her as compared to other citizens of the state, because the following Indiana statute, as *construed* by the following decision of *this Court* and the Indiana courts of last resort, give this privilege of suing within three years to *all* Indiana *citizens* as a *class*, against *all* foreign insurance *companies* doing business in the state as a *class*, without distinction as to the time when the plaintiff *becomes* a citizen of this state, or the condition of "*maturity*" or non-maturity of the policy at the time of becoming a citizen. It is a rule of *public policy* of Indiana to which all foreign companies agree to submit, by their act of doing business in the state.

Sec. 39-1713, Burns' Ann. Sts. 1933 (Original Vol. 8)

Sec. 39-1710, Burns' Ann. Sts. 1933 (Original Vol. 8)

Metropolitan Casualty Ins. Co. v. *Brownell* (1935), 294 U. S. 580, 585, 586; 55 S. Ct. 534, 541

Metropolitan Casualty Ins. Co. v. *Brownell* (C. C.A. 7, 1934), 68 F. (2d) 481, 482, 483

Kernel v. *Nat. Life & Accident Ins. Co.* (1937) 105 Ind. App. 181, 182, 184-185; 12 N. E. (2d) 392. *Transfer denied* by Indiana Supreme Court.

Rutherford v. *Prudential Ins. Co.* (1905), 34 Ind. App. 531, 535-536, 541; 73 N. E. 202

Caywood v. *Supreme Lodge* (1908), 171 Ind. 410, 413; 86 N. E. 482

III.

The decision below lays down the rule of comity so broadly that Indiana will always be compelled to enforce contractual limitations in policies of foreign companies simply *because* the limitation is valid in the state where made. The decision below holds:

> "*Because* the contractual limitation is valid in New York, the *loci contractus*, it is *not* a violation of the *public policy* of Indiana to enforce it in Indiana." (Our emphasis.)
>
> (R. 76, bottom.)

The above ruling is a *non-sequitur*, which in effect strips the above cited Sec. 39-1713 of all meaning. The statute deals only with foreign companies and such companies nearly always *issue* their contracts out of home offices

in their home states in forms valid under the laws of the home state. The ruling also strips Indiana of power to enforce its *public policy* in matters of *remedy*, in favor of its own citizens, suing in its *own courts*, against foreign companies which have impliedly agreed with the state to submit to its public policy by doing business in the state. This ruling conflicts with the decisions of this Court and of Indiana above cited under II. It also conflicts with the following further decisions of this Court and of Indiana, holding that the law of the *forum* governs *all matters of remedy*, such as limitations (or even interest on an unliquidated obligation), even though the contract was made in another state or the cause of action "matured" in another state:

Kavalsky v. *Becker* (1940), 217 Ind. 524, 532; 29 N. E. (2d) 560, 563, par. 9; 131 A. L. R. 1074

Klaxon v. *Stentor Electric Mfg. Co.* (1941), 313 U. S. 487, 494, 497-498; 61 S. Ct. 1020, 1021, 1022; 85 L. Ed. 1477

Townsend v. *Jameson* (1850), 9 How. 407, 413, 13 L. Ed. 194, 197

Wherefore, Petitioner prays that this Court's writ of certiorari may issue to review this cause, and for all proper relief.

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Respondent.

BRIEF SUPPORTING PETITION FOR CERTIORARI.

Summary.

I. The basic premise of the decision below, on the subject of when a policy "matures", is in *direct conflict* with an Indiana Supreme Court decision eleven days earlier, thereby violating the rule in *Erie R. Co.* v. *Tompkins,* 304 U. S. 34.

II. Even if the above "maturity" premise be correct, still petitioner was entitled to protection of the Indiana statute giving her three years to sue, as previously *construed by this Court* and the Indiana courts. The

decision below deprives her of the protection of the statute and of those decisions of this Court and the Indiana courts, and discriminates against her as compared to other Indiana citizens.

III. In the field of conflict of laws, the court below was confronted with a conflict between a one-year limitation clause in a New York contract and the *statutory public policy* of Indiana which allows at least three years to sue on such contracts in Indiana courts. The court below construed the *comity* rule so broadly as to enforce this contractual limitation in Indiana's courts simply,

> "because the contractual limitation is valid in New York, the loci contractus * * *."

This statement of the comity rule is too broad—so broad as to strip Indiana of power to enforce its *public policy* in a strictly *remedial* matter in its *own courts.*

ARGUMENT.

The facts being sufficiently stated in the opening part of the petition and in the opinion below (R. 74-78), are not repeated here. The following law propositions are directed to the Reasons of like number in the petition.

I.

Conflict with Indiana decision on "maturity" doctrine.

The decision below violates the rule in *Erie R. Co.* v. *Tompkins* (1938), 304 U. S. 64, by being based on a "maturity" premise *directly in conflict* with an Indiana Supreme Court decision rendered eleven days earlier. This precedent was called to the attention of the court below as soon as discovered, and while that court still had full jurisdiction to correct its decision to conform to it (R. 84-87), but was ignored by that court (R. 88, bottom). See Reason I in the foregoing petition for quotation and citation of these conflicting decisions.

This "maturity" premise is essential and basic in the decision below. The District Court dismissed the original complaint on the ground that "the plaintiff had become a resident (of Indiana) *after* the action *accrued*. The policy had *matured* before it was in any way affected by the laws of Indiana." (R. 29-31). Plaintiff asked leave to file an amended complaint under Civil Procedure Rule 15 (R. 31), which contained additional fact allegations and documentary exhibits showing that the policy did not "mature" until after she became an Indiana citizen, *because* proof of death and other conditions precedent

emanated from Indiana after plaintiff became a citizen thereof (R. 35-37, Par. 9, R. 76). Defendant objected to its filing on the ground that the action was still barred under the additional facts alleged (R. 62, top, Par. 3). The District Court refused leave to file the amended complaint and rendered judgment of dismissal (R. 62, bottom). The Circuit Court of Appeals' opinion recites the above record and affirms the dismissal on the following premises:

> "The policy had *matured* before it was in any way affected by the laws of Indiana. * * * Plaintiff, however, insists that in her amended complaint, which the court did not permit to be filed, are allegations that the *notice of death and the proof of loss* which emanated from *Indiana* are conditions precedent to the accrual of the policy. We cannot agree with this reasoning. A contract of insurance *matures at death* and notice of death and filing proof of loss, while essential to the payment of claims, are necessarily subsequent to maturity." (Our emphasis.)
>
> R. 76.

The conflicting ruling in the Indiana precedent is likewise essential and basic in that decision. The Indiana opinion says:

> "We need discuss *but one* of the several questions presented by this assignment. * * * At the conclusion of the evidence the appellant was denied a *peremptory instruction* which called to the attention of the court that there was no evidence of submission of *proof of death and therefore no liability.* * * *
>
> "In the case at bar the appellant's (insurance company's) promise was 'upon receipt of due proof of death * * * to pay * * *.' *Not merely* the fact of *death* but the fact of *proof* of death, or waiver thereof prior to the filing of the complaint, were *necessary* to *mature* a cause of action. * * * A *peremptory in-*

struction for appellant should have been given. * * * " (Our emphasis.)

Equitable Life Assurance Society v. *Kelleman*, (Ind. Supreme, Nov. 8, 1946), 69 N. E. (2d) 244, 245-246.

The opinion below, besides violating and ignoring the above Indiana precedent, cites no authority from Indiana or anywhere else to sustain the "maturity" rule laid down (R. 76).

If Reason I, *supra*, is well taken, petitioner respectfully urges that such a *conflict between simultaneous decisions* of the Indiana Supreme Court and the court below, which the latter court has refuesd to rectify (R. 84-88), warrants certiorari without the necessity of considering Reasons II and III.

II.

Erroneous construction of Indiana statute, contrary to construction of same statute by this Court and Indiana courts.

Even, if the premise attacked in Reason I be correct—if petitioner-plaintiff's cause of action "matured" before she became an Indiana citizen,—still she was entitled to the benefit of the Indiana statute when she sued in Indiana.

The Indiana statute cited under Reason II is a remedial one regulating the *time* allowed for filing actions in Indiana courts against foreign insurance *companies* who are doing business in Indiana, as a *class*. The statute is *classification* of foreign *companies*, as this Court and the Indiana courts have held in the cases above cited under Reason II and discussed *infra*. The decision below distorts the statute into a classification of *plaintiffs* and *policies*, and excludes petitioner-plaintiff from its protec-

tion on the ground that her policy "matured" before she came to Indiana.

The title of this statute reads:

> "An act regulating foreign insurance companies, doing business in this state, * * *." (Title quoted in *Kernel* v. *Nat. Life & Acc. Ins. Co.*, 1937, 105 Ind. App. 105, 184, footnote 2; 12 N. E. (2d) 392, 392, footnote 2).

The section of the above statute in question reads:

> "No such insurance company shall insert any condition in any policy hereafter issued requiring the insured to give notice forthwith, or within the period of time less than five (5) days of the loss of the insured property; nor shall any condition be inserted in such policy, requiring the insured to procure the certificate of the nearest justice of the peace, mayor, judge, clergyman or other official or person of such loss, or the amount of such loss; and any provision or condition contrary to the provisions of this section, or any condition in said policy inserted to avoid the provisions of this section, shall be void, and *no condition or agreement not to sue for a period of less than three* (3) *years shall be valid.*" (Acts 1865 (Spec. Sess.), ch. 15, sec. 6, p. 105). (Sec. 9136 Burns' Ann. Sts. 1926). (Our emphasis.)
>
> Sec. 39-1713, Burns' Ann. Sts. 1933 (Original Vol. 8).

Further light on Indiana's public policy is thrown by the following companion statute, also regulating foreign insurance companies:

> "*Every* insurance company and corporation not incorporated by or organized under the laws of the state of Indiana, and now or hereafter *doing business* in this state, *shall be subject to the process of the courts of this state,* in *any* action, suit or other legal proceeding, relating to or founded upon *any claim or demand of any character whatsoever,* held or as-

serted against said company or corporation, *by any citizen of the state of Indiana,* and process against such company or corporation shall be served in the manner as now provided by existing laws; Provided, That this act shall not apply to nor affect any pending litigation." (Originally enacted as Acts 1901, ch. 175, p. 375; Burns' Ann. Sts. 1926, sec. 9136, and amended by Acts 1927, ch. 170, sec. 1, p. 512, in slight changes of phraseology, not material here.)

Sec. 39-1710, Burns' Ann. Sts. 1933.

It is unnecessary to construe the above Section 39-1713 now, because that has already been done both by this Court and the Indiana courts in the cases discussed, *infra*. These judicial constructions have become as much a part of the statute as if contained in the text, as was held in *Supreme Lodge* v. *Meyer,* 265 U. S. 30, 32, 34; 78 L. Ed. 1137; 44 S. Ct. 432, 433, where this Court applied the rule that judicial construction becomes part of a statute, even though the courts of Indiana and Nebraska laid down directly opposite constructions of substantially similar statutes affecting the same insurance association. There is also the further rule in the background of this case that a statute relieving against limitations is remedial and liberally construed in case of doubt, as announced by the court below in *Sachs* v. *Ohio National Life Insurance Company,* (C. C. A. 7, 1942), 131 F. (2d) 135, 137, Par. 4. Coming now to the cases construing the above Section 39-1713:

Kernel v. *National Life & Accident Insurance Co.,* (1937), 105 Ind. App. 181, 182, 184; 12 N. E. (2d) 392, is a case where an Indiana citizen sued a Tennessee company (p. 182, top). The court laid no stress upon the question whether or not the contract *matured* in favor of an Indiana citizen, or was to be *performed* in Indiana, but stressed only the fact that this statute "was an act regulating foreign *companies* doing business in this

state" (p. 184, top). (Our emphasis.) The Indiana Supreme Court denied transfer in the above case, thereby placing the stamp of approval of that court upon the opinion. So far as we know it is the last word of Indiana courts on this statute.

Rutherford v. *Prudential Insurance Co.* (1904), 34 Ind. App. 531, 533-537, 541; 73 N. E. 202. This was an action against a New Jersey corporation. The policy quoted in the opinion is expressly payable "at its home office in the City of Newark, New Jersey" (p. 533). The policy was signed and executed "at its home office in the City of Newark, New Jersey" (p. 534). Hence, it was a New Jersey contract as much as ours is a New York contract. The opinion does not disclose in what state the policy was delivered, or in what state insured died, (apparently attaching no importance to those facts), but does disclose that the essential transactions which were the subject of controversy and upon which the case turned, *occurred in Kentucky* (pp. 535-536). The policy contained a six-months limitation clause which apparently was valid in New Jersey where the policy was executed and payable, but the Indiana court quotes the statute in question, holds the provision invalid under that statute, and permits plaintiff to sue after the specified time (p. 541, end of opinion).

Caywood v. *Supreme Lodge* (1908), 171 Ind. 410, 413; 86 N. E. 482, refers to this statute and says that it applies to any provision in the policy of "a foreign *company* doing business in this state." (Our emphasis.) The court then goes on to decide the question on the ground that the complaint does not show that the company is a foreign one (p. 413, top).

The opinion below is also in basic conflict with the following decision of the same Circuit Court of Appeals,

construing this same statute: *Metropolitan Casualty Insurance Co.* v. *Brownell* (C. C. A. 7, 1934), 68 F. (2d) 481, 482-483. A New York insurance company was sued by an Indiana citizen. The court, like the Indiana courts in the cases above cited, placed no stress or made any distinction upon the incidental questions affecting the *particular contract*, such as whether it was a New York or Indiana contract, whether it *matured* to an Indiana citizen, or otherwise. On the contrary, the court held that it was a legislative declaration of Indiana's *public policy* to the effect that three years is an unreasonable limit within which to require "parties *holding claims* under a policy of foreign insurance to assert their claims, or be forever barred".

The above decision was affirmed by this Court in *Metropolitan Casualty Insurance Co. of New York* v. *Brownell*, 284 U. S. 580, 581, 585-586, 55 S. Ct. 538, 539, 541. The court pointed out that the contract written by this New York company doing business in Indiana contained a *fifteen months limitation clause* (p. 581). The court said:

> "It is not beyond the range of probability that foreign casualty *companies*, as distinguished from domestic *companies*, generally keep their funds and maintain their business offices, and their agencies for the settlement of *claims*, outside the state. * * * We cannot say that these considerations may not have moved the Legislature to insist that a longer time should be given *for bringing suit* against foreign *companies* than the latter. * * * It could likewise decide whether the differences are general enough, as respects foreign companies, to call upon it in the exercise of legislative judgment, not shown to be irrational, to say whether the legislative prohibition should be applied to them as a *class* rather than to members of it selected by more empirical methods." (294 U. S., at pp. 585-586, 55 S. Ct., at p. 541.) (Our emphasis.)

In the above decision of this Court, this same statute is everywhere construed as being a *classification* of *companies*, not a classification of *contracts* of contract *holders*. None of the cases, Federal or Indiana, lay stress upon distinctions between different contracts of contract holders, or the *time* the beneficiary *became* a citizen of the state. It is a statute designed to protect all Indiana citizens who have "claims", in the language of this Court, against foreign companies as a class who do business in Indiana. This Court points out the legitimate basis for the statute, namely: that one who holds a claim against a foreign company may need a longer time to negotiate settlement with the distant home office, or to file suit, than one who holds a claim against a domestic company. This would apply to the present plaintiff as much as to any other claimant. Her need for time is no less than some claimant who moved to Indiana before his contract matured. If anything, her need for time would be greater, because she was a newcomer in the state.

What we have said cannot be answered by the argument in the opinion below that this was a New York contract and valid under New York laws (R. 75-76). It would equally be a New York contract (1) if insured had been a citizen of Indiana at the time it was issued to him, because it was executed at defendant's home office in New York and expressly specifies that it is to be governed by New York law (R. 10, 11, Pars. 12, 18). It would equally be a New York contract (2) if insured had become a citizen of Indiana after the contract was issued and had died in Indiana. It is no more and no less a New York contract by the fact (3) that insured lived in Pennsylvania, died in Georgia, and his widow became an Indiana citizen after his death. If the rule stated below about it being a New York contract and valid under New York law were controlling, it would apply equally to situa-

tions (1) and (2) just mentioned and would render the Indiana statute meaningless.

We believe that the true rule, as laid down by this Court and the Indiana courts in the above cases, is that in all three of the situations last mentioned, Section 39-1713, applies in favor of an Indiana plaintiff, because:

(a) The statute is a classification of *companies,* not a classification of *contracts* or contract *claimants,* and it applies to foreign companies generally. It would be of doutbful constitutionality, and at least highly unreasonable, to draw an arbitrary line between two classes of Indiana citizens, granting one a remedial right simply because he moved to Indiana before the contract matured, and denying the right to the other because he moved to Indiana after it matured. We can think of no reasonable basis for such discrimination, and moreover, there is no reason for engrafting such a provision upon the statute contrary to the above decisions of Indiana, of the court below, and of this Court.

(b) The State has exacted from foreign companies generally a remedial right in favor of all Indiana claimants who sue in Indiana courts, namely: that these companies shall not assert against the Indiana claimants a shorter contractual provision than three years. We wish to emphasize something that seems important to us: This waiver by the companies in favor of Indiana citizens does not result from Indiana's control of the issuance or delivery in the state of the *particular contract;* it results from Indiana's right to exact any conditions it sees fit from foreign companies as the price of doing insurance business in Indiana. For instance, it is common practice for states to require foreign companies to deposit a special fund with their insurance commissioner or state treasurer to guarantee payment of claims of the state's citi-

zens against the company before the state will permit the foreign company to do business within its borders.

What we have said in the last paragraph was recognized by the lower court in the above case of *Metropolitan Casualty Insurance Co.* v. *Brownell* (CCA 7, 1934), 68 F. (2d) 481, where the court pointed out that since Indiana had the power to exclude foreign insurance companies entirely, this necessarily included the power to impose whatever conditions it saw fit as a condition to their doing business in the state (p. 482). This Court carried this point further in the same case when it pointed out, in the language already quoted, that the statute draws a distinction between foreign companies generally and domestic companies based upon the fact that Indiana citizens may need a longer time to settle or sue upon their claims against foreign companies than against domestic ones. *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 585, 586; 55 S. Ct. 538, 541, *supra*.

The thing that saved this same statute from condemnation by this Court in the above case was that it applied to foreign companies generally as a class. It probably would have been struck down had it discriminated between foreign companies, and it would be equally unconstitutional if it actually means to discriminate between classes of Indiana citizens on an arbitrary basis of contract maturity or one of the other arbitrary features mentioned in the opinion, such as the place where insured lived or died, as held in the opinion below.

The above Sections 39-1713 and 39-1710 were repealed in the re-codification of Indiana's insurance laws in 1935, but that repeal has no effect on petitioner-plaintiff's rights because: (1) Both the District Court and the Circuit Court of Appeals expressly *treated* Section 39-1713 as being applicable (R. 29, 76), and (2) this cause of

action arose in the fall of 1933 (R. 75) and was saved by the following broad saving clause in the 1935 Act:

> "*No* right, power, privilege or immunity conferred, vested or secured by or *under any law* or laws hereby repealed shall be impaired or abrogated by reason of such repeal, nor shall such repeal affect any suits pending, *rights of actions conferred*, or *duties*, restrictions, liabilities or penalties imposed or required by or under any such law or laws upon any insurer or insurance *company* created under or *subject* to such law or laws, but every such insurance company shall, as to all actions hereafter performed, be subject to the provisions of this act."
>
> Acts 1935, Ch. 162, sec. 277, p. 812

Moreover, a vast number and amount of foreign insurance policies are now held by Indiana citizens which were issued *prior* to 1935—probably comprising the majority of all insurance policies now held in the state—all of which are still controlled as to contractual limitations by Section 39-1713, so this question is still vital to Indiana and her citizens generally, as well as to petitioner.

III.

Erroneous extension of comity doctrine.

The decision below lays down the rule of *comity* so broadly that Indiana is powerless to enforce her *public policy* against a contractual limitation, in her own courts, simply "*because* the contractual limitation is valid in New York, the *locus contractus*," as stated in the opinion below (R. 76, bottom).

This sweeping and dangerous extension of the comity doctrine does not apply even in favor of foreign *substantive* rights of contract or property. A state has power to refuse enforcement even of these, in its courts, when they conflict with its *statutory public policy*:

A. B. v. *C. D.* (D. C. Pa. 1940), 36 F. Supp. 85, 87, par. 5; Affirmed, 123 F. (2d) 1017; *Certiorari denied,* 314 U. S. 691

Union Trust Co. v. *Grossman* (1918), 245 U. S. 412, 38 S. Ct. 147, 148, 62 L. Ed. 368

Still less does any such comity doctrine apply in favor of a contractual *limitation* clause, which is purely a matter of *remedy,* as held by the following recent Indiana case where the cause of action *arose* in West Virginia, was *sued upon* in Indiana, and it was held:

> "The contract provides that no action on the contract shall be brought after the expiration of *one year* from the time such action accrues. This provision is void under the statute of Indiana, and the statute of limitation applies. The appellees contend that the law of West Virginia should control the time within which the action is brought, but it is well settled that statutes *and rules* governing the time in which actions may be brought affect *only* the *remedy,* and that the law of the *forum* will control." (Our emphasis.)

Karvalsky v. *Becker* (1940), 217 Ind. 524, 530-532; 29 N. E. (2d) 560, 563, par. 9; 131 A. L. R. 1074

This Court recently held that a state, such as Indiana, has a complete right "to *determine* whether a given matter is to be governed by the law of the forum," in a case involving *conflict of laws.* A contract was made in New York, performed in New York and various other states, and sued upon in Delaware. The unliquidated contract obligation would draw interest if sued upon in New York, by virtue of New York's interest statute. But Delaware had no such law. Held: that interest was a matter of *remedy,* and that the Delaware court was not required to enforce that remedial right contrary to her own public policy:

Klaxon v. *Stantor Electric Mfg. Co.* (1941), 313 U. S. 487, 494, 497-498; 61 S. Ct. 1020, 1021, 1022; 85 L. Ed. 1477

In the above case, the statutory right to interest under New York law, where the contract was made and partly performed, would become an implied part of the contract as firmly as the limitation clause in ours, but, being a *remedial* right, the state of the forum was not required to enforce it.

This Court has also held that limitations "*strictly* affect the *remedy* and not the merits," in a case where a contract cause of action "accrued" in Mississippi and had become barred by limitations of that state. Held: the cause could be sued on in Alabama if not yet barred by its laws:

Townsend v. *Jameson* (1850), 9 How. 407, 413; 13 L. Ed. 194, 197

And such is the law generally:

> "And it is held to be *immaterial* that the statutory bar has fully run against the contract in the jurisdiction where it was made, *or that the parties had remained subjects of the foreign state* or country, until the term of limitation had expired, or that plaintiff suing on a contract made in another state has been at all times a resident of that state, *or that the contract provided that it should be governed by the foreign law.*"
>
> 37 C. J. 731

Distinctions:

The only case cited by the lower court to sustain its comity ruling is directly against it: *Henning* v. *Hill*, 80 Ind. App. 363; 141 N. E. 66. The case holds that an oral Illinois contract for real estate commission was enforceable in Indiana "*unless* its enforcement would be

contrary to good morals, *or* in violation of *public policy*, or *forbidden* by positive law" (which is true of the statute in our case). The court in that case held that the Indiana statute of *frauds* did not *forbid* such a contract or make it against *public policy* but merely prescribed the "formality" for making Indiana contracts on that subject (pp. 365-366).

The opinion below discusses a point not in the case when it says that "a person cannot *select* a forum for the commencement of an action and thereby invoke a different and more favorable law *other* than in *strictly procedural* matters than exists in the *lex loci contractus.*" (R. 76).

If the above language means to hold that this limitation question is not "strictly procedural," it violates the above Indiana decision of *Kavalsky* v. *Becker* (1940), 217 Ind: 524, 532, and violates the above decisions of this Court in *Klaxon* v. *Stentor, etc. Mfg. Co.* (1941), 313 U. S. 487, 494, 497-498, and *Townsend* v. *Jameson* (1850), 9 How. 407, 413; 13 L. Ed. 194, 197.

If the above language means to say that petitioner-plaintiff was guilty of any improper purpose in coming to Indiana, it is rebutted by the earlier statement in the opinion that she "became a citizen of Gary, Indiana, as she established residence with relatives" following her husband's burial (R. 75). Her bona fide residence is alleged in the complaint (R. 2) and not questioned by the motion to dismiss, (R. 22-26).

Home Ins. Co. v. *Dick*, 281 U. S. 397, 50 S. Ct. 338, which the lower court's opinion cites on the above nonexistent issue, was a *garnishment* action *in rem*, brought in the Texas court, based upon *publication* with *no personal jurisdiction* of the defendant which was a corporation of Mexico, a foreign country (p. 402). Held: that

Texas could not enforce its public policy against the Mexican corporation in that *kind* of action, because:

> "But the Mexican corporation never was *in* Texas * * * The Mexican corporation was *not before the court* * * * *We need not consider* how far the state may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to *do business* within its borders; or how far it may go in *refusing to lend the aid of its courts* to the enforcement of rights acquired *outside* its borders. * * *" (p. 410).

Therefore, it is respectfully submitted that the petition for certiorari should be granted.

Owen W. Crumpacker,
Jay E. Darlington,
Attorneys for Petitioner.

APPENDIX.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 9003. OCTOBER TERM AND SESSION, 1946.

LILLIAN BLEWEISS SMITH, *Plaintiff-Appellant,*

vs.

COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA, *Defendant-Appellee.*

Appeal from the District Court of the United States for the Northern District of Indiana, Hammond Division.

November 19, 1946.

Before SPARKS and KERNER, *Circuit Judges,* and HOLLY, *District Judge.*

KERNER, *Circuit Judge.* Upon the death of her husband, plaintiff as beneficiary of a certificate of membership constituting a contract of insurance sued defendant. Defendant filed a motion to dismiss plaintiff's complaint on the grounds (1) that defendant, a New York corporation, was never qualified to do business in Indiana and therefore was not subject to the jurisdiction of the District Court there, and (2) that a one-year limitation in the contract barred plaintiff's action. The trial court filed a memorandum opinion on defendant's motion in which the question of jurisdiction was resolved against defendant, but the motion to dismiss was sustained on the ground that plaintiff's action was barred by the contractual limitation of one year. Plaintiff thereafter petitioned for leave to file an amended complaint wherein it was alleged that the one-year limitation clause was not applicable to plaintiff's case. The District Court denied plaintiff's petition and judgment

was entered dismissing the action. To reverse the judgment, plaintiff appeals.

In 1930 defendant issued to Harry E. Smith, a resident of Pennsylvania, a certificate which insured him upon enumerated conditions against loss by accidental means of life, limb, sight, and time. The insurance benefit against loss of life was $10,000. In 1932 a change of beneficiary was effected and Lillian Bleweiss, intended wife, who later married insured and is the plaintiff here, was made the beneficiary. August 30, 1933, in Atlanta, Georgia, insured was injured, and on October 11, 1933, he died from his injuries. Plaintiff notified defendant of insured's death by letter dated October 18, 1933. Then, or soon afterwards, plaintiff became a citizen of Gary, Indiana, as she established residence with relatives and mailed all her subsequent correspondence regarding the claim from there. She filed proof of loss, and agreed in writing with defendant to allow it to exhume and perform an autopsy upon the body of deceased. March 23, 1934, plaintiff's claim was considered and rejected by defendant and plaintiff was notified of defendant's decision by letter dated March 27, 1934. Thereafter, on September 19, 1935, plaintiff commenced this action.

Unless we hold for plaintiff the question to be decided is whether the cause of action is barred by the one-year limitation clause in the contract.

Defendant is a mutual association doing business on an assessment basis. The certificate or contract was signed and delivered by defendant at its office in Utica, New York, and thereby defendant insured plaintiff's husband, a resident of Greensburg, Pennsylvania. In the certificate there is a specific provision providing: "This contract is . . . to be construed in accordance only with the laws of the State of New York."

In conflict of laws, the *lex loci contractus* may mean either the law of the place where the contract was made or the place of its performance. Here it means the place where the contract was made (New York) because place of performance is not specified, and the rights of membership in an incorporated beneficiary society are determined by the law of the State of incorporation. *Modern Woodmen of America* v. *Mixer*, 267 U. S. 544; *Royal Arcanum* v. *Green*, 237 U. S. 531. Thus, it is clear that we must look

to New York law to determine the validity of the contract's limitation clause. The New York courts have held unequivocally that a one-year limitation in an insurance contract is valid, *Hanna* v. *Commercial Travelers Ass'n*, 142 N. E. 288; *Savery* v. *Commercial Travelers Ass'n*, 263 N. Y. S. 118. Moreover, "parties to a contract of insurance may provide for a shorter limitation of actions than that provided in the general Statute of Limitations." *Brandyce* v. *Globe & Rutgers Fire Ins. Co.*, 168 N. E. 832, 833.

Plaintiff contends, however, that the remedial laws of Indiana apply to a contractual limitation in an insurance contract, *Karvalsky* v. *Becker*, 217 Ind. 524, and that the applicable Indiana statute at the time the action was brought, § 39-1713 Burns' Indiana Stat. Ann. 1913 (original vol. 8), provided that no foreign insurance company could insert a contractual limitation of less than three years. But as the court observed in its memorandum opinion, "The policy had matured before it was in any way affected by the laws of Indiana." As we have already noted, the contract had its origin in New York and was issued to a citizen of Pennsylvania. The insured was injured and died in Georgia. Nowhere does it appear that the parties to this contract ever contemplated performance or that performance was to be had in Indiana. In such a situation we think it is clear that we must look to New York and not Indiana law.

Plaintiff, however, insists that in her amended complaint, which the court did not permit to be filed, are allegations that the notice of death and the proof of loss which emanated from Indiana are conditions precedent to the accrual of the policy. We cannot agree with this reasoning. A contract of insurance matures at death, and notice of death and filing proof of loss, while essential to the payment of claims, are necessarily subsequent to maturity. Moreover, a person cannot select a forum for the commencement of an action and thereby invoke a different and more favorable law other than in strictly procedural matters than exist in the *lex loci contractus*. *Home Ins. Co.* v. *Dick*, 281 U. S. 397. Because the contractual limitation is valid in New York, the *loci contractus*, it is not a violation of the public policy of Indiana to enforce it in Indiana. *Henning* v. *Hill*, 80 Ind. App. 363. In our case Indiana law would be applicable only if the contract had

been issued by an Indiana company. That was the situation in *Karvalsky* v. *Becker, supra,* and it is thereby distinguishable.

Plaintiff also contends that even if the one-year limitation was enforceable, it was waived by the failure of defendant to act within sixty days upon plaintiff's proof of loss. In support of her theory plaintiff relies particularly on paragraph 8 of the certificate which states: "No action at law or in equity shall be brought to recover on this Certificate prior to the expiration of sixty days after proof of loss has been filed . . ." The waiver, plaintiff argues, is based upon dependent covenants arising out of a construction of the contract to the effect that the respective parties were to perform acts alternatively within specified times for the benefit of both parties. It is urged that the contract provides that plaintiff was to furnish proof of loss within ninety days: that defendant was to act with finality on the proof within sixty days; and that legal action, if any, was to be taken within one year.

While it is true that defendant failed to take action within sixty days after receipt of proof of loss, an inspection of the certificate fails to sustain the allegation that defendant was under a duty to plaintiff either to pay or refuse payment on the contract within sixty days after proof of loss. Nothing in the quoted words nor in the balance of the paragraph which refers to the one-year limitation supports plaintiff's contention of a duty existing between defendant and plaintiff. An earlier paragraph in the certificate provides: "Payment of Benefits provided by Section A [loss of life] will be made within sixty days after receipt of due proofs." This statement is considerably more direct but even it fails to raise the presumption of existing duty, because where there is a denial of liability certainly no payments are to be made. Defendant refused payment on the ground that insured's death was due not primarily to the accident, and plaintiff was first notified of defendant's decision on March 27, 1934. This was approximately five and one-half months after plaintiff notified defendant of her claim. The claim was finally rejected on May 8, 1934, about eight months after the date of the accident. Plaintiff, therefore, had sufficient time in which to bring action within the remaining four months of the contract limitation year, yet her action was not commenced until September 19, 1935, about

two years from the date of the accident. Where the pleadings fail to allege bad faith, fraud, or promises to pay, but merely allege delay due to continuing negotiations regarding the claim, and the defendant has done nothing to mislead plaintiff, the reasonable contractual limitation must control. *Continental Ins. Co.* v. *Fire Ass'n of Philadelphia*, 152 F. 2d 239.

Finally, plaintiff argues that the District Court erred in denying her petition to file the amended complaint. There was no error because in this opinion we have considered and rejected the contentions set forth in the amended complaint. The one-year limitation in the contract is controlling and nothing urged by plaintiff nullifies its decisiveness.

The judgment of the District Court is

AFFIRMED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946.

No. 1058

LILLIAN BLEWEISS SMITH,

Petitioner,

vs.

COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA,

Respondent.

Reply Brief

Supporting Certiorari Petition.

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SUMMARY.

The "unprinted record" cited by respondent is on a separate branch of the case which was rendered moot by the Circuit Court of Appeals' decision, and which is not involved in the Circuit Court of Appeals' decision nor in our Petition for Certiorari. The entire record on which the Circuit Court of Appeals' decision was based, and on which our petition is based, is now before this Court in printed form. The parties stipulated that the

"unprinted record" need not be printed at this time. (See Argument for citations and stipulation).

Respondent is a New York insurance corporation for the purpose of this petition, having so described itself in its motion to dismiss in the District Court, and being so described in the Circuit Court of Appeals' opinion. (Citations in Argument, *infra*).

Respondent was doing business in Indiana for jurisdictional purposes, as found by the District Court after hearing oral evidence, and not modified by the Circuit Court of Appeals on that branch of the case, so for purposes of the present petition this subject is settled and not here for review.

I.

On the conflict between the opinion below and the Indiana Supreme Court on the "maturity" doctrine, Respondent makes no answer except to attempt a hair-splitting distinction which defeats itself. (See Argument, *infra*).

II-III.

On construction of the Indiana statute, *Section* 39-1713, *Burns* 1933, Respondent offers no Indiana cases except a misleading citation of *General American Life Insurance Company* v. *Carter* (1944) 222 Ind. 557, 54 N. E. (2d) 944, without telling the Court that the case is based on a later and different statute, not here involved (Respondent's Brief, 3, 8). (See Argument, *infra*).

Home Insurance Co. v. *Dick* (1930) 281 U. S. 397 was a garnishment action *in rem*, where the insurance company *never did business* in Texas, and the Texas court had *no jurisdiction of its person* and hence no power to enforce its statutory public policy against it. The opin-

ion is expressly placed on that ground (p. 410). *Modern Woodmen* v. *Mixer* (1925) 267 U. S. 544 and *Supreme Council of Royal Arcanum* v. *Green* (1915) 237 U. S. 531 involved substantive—not remedial—parts of the contracts. (See Argument, *infra*).

The Indiana cases construing this statute, including *Kernel* v. *Nat. Life & Acc. Ins. Co.* (1938), 105 Ind. App. 181, 182, *transfer denied,* and *Rutherford* v. *Prudential Ins. Co.* (1905), 34 Ind. App. 531, 535-536, do not rest upon the question of whether the policy sued on was "issued in Indiana", as Respondent argues. The cases do not even mention that fact, treating it as immaterial, but the *Rutherford* case at least was one where the essential acts in dispute were transacted in Kentucky (pp. 535-536).

Respondent has no answer to this Court's decision construing this same Indiana statute in *Metropolitan Casualty Co.* v. *Brownell* (1935) 294 U. S. 580, 585-586, except to remark that the policy was "issued in Indiana and to be performed there",—a fact which appears only incidentally, if at all, in the *Brownell* opinion and was *not the basis of the decision.* Respondent has no answer to the point decided in the *Brownell* case,—that this statute is a remedial one and based on Indiana's public policy and applies to foreign insurance *companies* as a *class.* The opinion below distorts this statute into a classification of *contracts* and contract *holders* and denies Petitioner the protection of the statute on the arbitrary and discriminatory ground that her contract "matured" before she became an Indiana citizen. (See Argument, *infra*).

ARGUMENT.

The "Unprinted Record".

Respondent's attempted citations of an "unprinted record" need a word of explanation.

All the regular record which forms the basis of the decision of the Circuit Court of Appeals, and of our Petition for Certiorari, has already been printed and filed in this Court.

The "unprinted record" is a *supplemental* manuscript record containing evidence on an entirely *separate branch* of the case which was filed but never printed in the Circuit Court of Appeals. This branch of the case was never decided or passed upon by the Circuit Court of Appeals, because that court decided against us solely on the regular printed record which is now before this Court, and under its decision the branch of the case covered by the unprinted supplemental record became moot.

Upon our showing this situation to the Circuit Court of Appeals (R. 90, par. 5), that court made an order that this manuscript supplemental record be certified up to this Court in original form without printing and separate from the regular printed record, which has been done (R. 93).

After reaching this Court, Petitioner and Respondent filed a stipulation with the Clerk of this Court, as permitted by *Rule* 38(8), designed to avoid the unnecessary expense of printing this supplemental manuscript record until and unless its need might become apparent,

when it could then be printed either on order of this Court or on request of Respondent. The stipulation reads:

> "Come now petitioner and respondent by their undersigned attorneys of record and stipulate that the supplemental record certified up by the clerk of the Circuit Court of Appeals in this case in original form, need not be printed by the clerk of this court until and unless so requested by either party or directed by the court.
>
> This stipulation is without prejudice to the rights of either party on any subject in this case, and is without prejudice to the right of either party to apply for the printing of said supplemental record at a later date, and without prejudice to any questions respondent may have a right to predicate on the printed or supplemental record either in its present form or future form if printed."

More specifically as to the lack of necessity, or even propriety, of considering this supplemental record in determining the pending Petition for Certiorari:

In the District Court, defendant-respondent moved to dismiss the complaint on two separate grounds: (1) that defendant-respondent was not in fact doing business in Indiana and hence not subject to service of summons through the Auditor of State (R. 24 top); and (2) that the complaint was barred by a limitation clause in the policy sued upon (R. 25). The District Court heard evidence on the first issue (doing business) (R. 26 bottom) and decided that issue in favor of plaintiff-petitioner (R. 28), but decided the second issue (limitations) in favor of defendant-respondent (R. 28 bottom).

Plaintiff-petitioner appealed from the adverse decision on the limitations issue, but defendant-respondent took no cross appeal, nor assigned any cross error from the

decision against it on the doing-business issue within the ninety days allowed. However, after the ninety days and after plaintiff-petitioner had filed her printed record and brief in the Circuit Court of Appeals (being all the record bearing on the limitations issue which she was appealing), defendant-respondent petitioned the Circuit Court of Appeals for leave to bring up a supplemental record containing testimony of witnesses on the doing-business issue, so as to be able to argue that if the Circuit Court of Appeals reversed the District Court on the limitations issue, it should also reverse the District Court on the doing-business issue and thereby let defendant-respondent out of court on that issue. Plaintiff-petitioner resisted this request to bring up the supplemental record by a reply contending that it was an attempted cross-appeal too late. The Circuit Court of Appeals never made a final decision of the merits of that question but made a tentative order permitting the supplemental record to be filed in that court in manuscript form without printing, and with leave to plaintiff-petitioner to move to strike this supplemental record (R. 90, pars. 2 and 3). Such motion to strike was made but never ruled upon, because the Circuit Court of Appeals affirmed the case solely on the limitations issue and hence had no need to pay, and did not pay, any attention to the procedural question of whether defendant-respondent had properly brought up the doing-business issue and supplemental record thereon, nor the substantive question of the merits of that issue (R. 90, pars. 4 and 5; R. 74-78 opinion).

We rely on the principle that this Court will not review issues and evidence not decided by the Circuit Court of Appeals—that when a final decision of that court contravenes the law and petitioner's rights so

seriously as to merit review, this Court will review the questions on which the decision is based, but will not review a separate issue not decided by the Circuit Court of Appeals on the theory that that court might have reached the "same result" by deciding the other issue, as respondent attempts to argue. The District Court decided that other (doing-business) issue in favor of plaintiff-petitioner (R. 28) and this Court will accept that decision as final until and unless it is properly taken up to the Circuit Court of Appeals for review (and we have contended it was not) and there decided. This is particularly true because the District Court's decision of this doing-business issued rested on oral testimony (R. 26 bottom) which respondent improperly attempts to cite to this Court.

Corporate Nature of Respondent.

Contrary to respondent's confusing statement (page 1) that it is not a corporation but some kind of "mutual association":

1. Defendant-respondent's Amended Motion to Dismiss in the District Court admitted that it was and is "a corporation duly organized under and by virtue of the laws of the State of New York" (R. 23 bottom).

2. The Circuit Court of Appeals' opinion describes respondent as "a New York corporation" (R. 74).

3. The Indiana Supreme Court has held that the Indiana statute in question, *Sec.* 39-1713, Burns 1933, applies to all kinds of foreign insurance companies, including mutual and fraternal associations. *Caywood* v. *Supreme Lodge* (1908), 171 Ind. 410, 413; 86 N. E. 482. This Court has also construed the same statute in accord with Indiana's decisions, as applying to foreign insur-

ance companies generally as a *class. Metropolitan Casualty Ins. Co.* v. *Brownell* (1935), 294 U. S. 580, 585, 586; 55 S. Ct. 534, 541.

Doing Business in Indiana.

The District Court, after hearing oral evidence on the doing-business issue (R. 26 bottom), expressly found and decided that "defendant was doing business in Indiana requisite for jurisdictional purposes," and based its decision on the law as applied "to the facts in this case" (R. 28).

The Circuit Court of Appeals did not review the District Court's finding and decision on the doing-business issue, and that issue is not here involved, as above shown under the discussion of the "unprinted record."

Respondent's attempt to justify the Circuit Court of Appeals' decision on the ground that the "correct result" was reached because respondent was not doing business, (pages 5, 15), seems to us to be an implied admission that the grounds of the Circuit Court of Appeals' decisions are untenable, otherwise respondent would not go to such pains to urge upon this Court oral evidence and law questions on the doing-business issue which are so clearly improper (pages 1, 5 (par. IV), 15).

I.

Conflict with Indiana Supreme Court on "Maturity" Doctrine.

Respondent, having no effective answer to this first ground of our petition, reverses the order of presentation and discusses this ground under III at pages 4 and 14.

Respondent's only answer is an attempt to make a hair-splitting distinction between the maturity of plain-

tiff-petitioner's "claim" and her "cause of action" (Respendent's Brief, 14).

But the Circuit Court of Appeals' opinion nowhere speaks of the maturity of a "claim" (R. 76). It makes no such distinction, nor any distinction, of the contrary Indiana case, *Equitable Life Ins. Soc.* v. *Kelleman* (Nov. 8, 1946), Ind., 69 N. E. (2d) 244, 245, par. 3. Nor does the latter case mention any such distinction (page 245).

Confronted by a situation where the widow became an Indiana resident and citizen immediately after her husband's burial and *before* she furnished notice of death and *proof of loss* to the company (R. 35, par. 9 to R. 37), the Circuit Court of Appeals' opinion admits those facts (R. 75) and then lays down the law, without citing any Indiana authority, that "The *policy* had *matured* before it was in any way affected by the laws of Indiana • • • A *contract* of insurance *matures at death* • • • (R. 76, our emphasis). The opinion uses that doctrine as its *basic premise for denying* plaintiff-petitioner the protection of the Indiana statute (R. 76).

Respondent's futile attempt to explain its hair-splitting distinction is our best argument that no substantial distinction exists between the rulings of the Circuit Court of Appeals and the Indiana Supreme Court. Respondent says:

> "In the *Kelleman* case, the point was that filing of proof of death was a condition precedent to *maintaining the action* regardless of where the claim arose. The learned *Court of Appeals* said that the *right of action* arose at the death of the member. The *right or cause of action* and the *right to prosecute it* are two different things" (Respondent's Brief, 14, our emphasis).

The only authority cited for the above confusing doctrine, *May* v. *The State* (1893), 133 Ind. 567, 33 N. E. 352, rested on the peculiar situation that plaintiff had a claim against the *sovereign* state of Indiana for services in erecting a public building in 1860, for which there was no appropriation and no right to sue the sovereign state until it passed an act in 1889 consenting to be sued by persons "claiming to have a money demand against the State of Indiana, * * * accruing within fifteen years from the time of the commencement of the action." (133 Ind. 567-568). The sole question was the construction of the above statutory language, and the court held that the legislature intended to exclude plaintiff's claim which was more than fifteen years old. The court explained that: "the question presented for our consideration by the record in this case, is *not one for the ordinary application of the rules* governing statutes of limitation, but the question is whether the claim which constitutes the basis of the action *falls within the terms of the act* under immediate consideration." (p. 570. Our emphasis).

On the other hand, the law of Indiana is settled by a later *insurance* case, that in the field of insurance:

> "Such notice (of loss by insured to company) was a condition precedent to appellant's (company's) *liability,* * * *" (Our emphasis).
>
> *Newark Fire Ins. Co.* v. *Martinsville Harness Co.* (1920), 74 Ind. App. 14, 16; 128 N. E. 616.

The same doctrine is the basis of the above decision of the Indiana Supreme Court in *Equitable Life Ins. Soc.* v. *Kelleman* (Nov. 8, 1946), Ind. , 69 N. E. (2nd) 244, 255, par. 3, which preceded the Circuit Court of Appeals' decision by eleven days. The court said that by the terms of the policy the company *did not promise to pay until* proof of death was furnished to it by the beneficiary (69 N. E. (2d) 244, 245, par. 3).

Our policy contains terms of payment practically identical with the policy in the above case of *Equitable* v. *Kelleman*:

> "Payment of benefits provided by Section A (death benefit, etc.) will be made within sixty days *after* receipt of due proof * * *. Affirmative proof of loss *must* be furnished * * *" R. 85, 42, 45.

Since the Circuit Court of Appeals' opinion used the "maturity" doctrine as the basic premise for denying plaintiff-petitioner the benefit of the Indiana statute (R. 76), this important right of an Indiana citizen under the contrary principle in *Equitable Life Ins. Soc.* v. *Kelleman* (Nov. 8, 1946) Ind. , 169 N. E. (2d) 244, 245, should not be arbitrarily denied by an opinion which totally *ignores* the decision (R. 76), though the decision was urgently pressed upon the court as soon as discovered (R. 84-85, 86-87), and rejected without comment or attempted distinction by the court (R. 88 bottom).

The same principle was already established in Indiana prior to the above *Kelleman* case, by the above quoted *Newark Fire Ins. Co.* v. *Martinsville Harness Co.* (1920) 74 Ind. App. 14, 16; 128 N. E. 616, but even if the principle of the *Kelleman* case had been newly decided, it was still incumbent on the Circuit Court of Appeals to respect it and conform its opinion and decision to it, because Respondent does not dispute, and cannot dispute, that the Circuit Court of Appeals still had control over this case and power so to do when it made its refusal. (R. 88 bottom).

Vanderbark v. *Owens Illinois Glass Co.* (1941) 311 U. S. 538, 543, 61 S. Ct. 347, 350.

II-III.

The Indiana Statute—Public Policy and Comity.

Respondent has been unfair to this Court, and to Petitioner, by citing and arguing (Brief 3, 8) the case of *General American Iife Insurance Company* v. *Carter* (1944) 222 Ind. 557, 54 N. E. (2d) 944, without mentioning the fact that this case was based entirely on a *different statute* not here involved—the 1935 Act—and hence has no bearing on our case (222 Ind. at pp. 559, 564). The 1935 Act contained a saving clause, saving all of this Petitioner's rights under the earlier 1865 Act, as pointed out at pages 20-21 of our previous brief and not denied by Respondent's brief. The 1935 Act made important changes *in favor* of foreign insurance companies, which need not be gone into here because Respondent admits that this case comes under the 1865 Act, *Section* 39-1713, *Burns* 1933, which respondent describes as "the three year statute" (Respondent's Brief, 2 bottom, 4 top).

But in discussing this three year statute, Respondent goes right ahead and cites and argues the above *Carter* case, 222 Ind. 557 (Brief, 3, 8), *as if* it were authority on that statute, *without mentioning* the fact that it is based on a later and different statute. In fact, in arguing the *Carter* case, Respondent goes so far as to say: "The court refused to allow plaintiff to take advantage of this Indiana statute providing for service on a foreign insurance company found within the state." (Respondent's Brief, 8, middle). This is apt to be highly misleading because of the superficial resemblance of the *Carter* case to ours, and this misleading citation and argument is one of the reasons we deemed it necessary to file this Reply Brief.

Respondent cannot say it was ignorant of the above fact that the *Carter* case rested on a different statute, because Respondent's counsel was counsel for the insurance company in the *Carter* case, as shown by the report (222) Ind. at p. 559), and he was also counsel for the insurance company in the above case of *Equitable* v. *Kelleman* (69 N. E. (2d) at p. 244).

Home Ins. Co. v. *Dick* (1930) 281 U. S. 397 on which Respondent strongly relies, and on which the Circuit Court of Appeals based its decision (R. 76), is distinguished in our previous brief at pages 24-25 on the ground that the action was a garnishment action *in rem* with *no personal jurisdiction* over the defendant insurance company, which had *never done business* in Texas, and hence the Texas Court was powerless to enforce its statutory public policy against the insurance company, and the decision was *expressly limited* to that ground (281 U. S. at 410), whereas in our case defendant was personally before the court with a motion to dismiss which invoked and obtained the court's decision on the merits of the contract—the limitation clause (R. 25-26, 28-31, 74-78).

Modern Woodmen v. *Mixer* (1925) 267 U. S. 544, 45 S. Ct. 389, relied on by respondent, involved a *substantive* part of the insurance contract—a by-law which provided that long continued absence of the insured, short of his life expectancy, "shall not give any right to *recover on* any benefit certificate." The case holds that this *substantive* part of the membership contract in this fraternal beneficiary society, valid in Illinois where the society was incorporated, could not be abrogated by the Nebraska Supreme Court so as to permit plaintiff to sue in Nebraska and recover on the contract *before* the life expectancy of the insured had expired—in other

words before the contract was by its terms *due and payable* (p. 350).

Supreme Council of the Royal Arcanum v. *Green* (1915) 237 U. S. 531, 35 S. Ct. 724, 59 L. Ed. 1089, on which the above *Mixer* case is predicated, and which is cited along with the *Mixer* case in the Circuit Court of Appeals' opinion (R. 75), simply holds that New York cannot abrogate or regulate "an increase in the assesment rates" which a Massachusetts mutual benefit society levied on its members in New York, the rates being valid under Massachusetts law and sustained by a Massachusetts judgment.

Neither the above *Mixer* or *Green* cases are authority on (1) the power of Indiana to legislate on the *remedial* subject of limitations so as to enforce her own public policy in favor of Indiana plaintiffs suing in Indiana courts against foreign insurance companies which have impliedly consented to submit thereto by doing business in the state, (2) nor are those cases any authority on the *meaning* of the Indiana statute as construed by the Indiana courts and by this Court.

The language of *Modern Woodmen* v. *Mixer* (1925) 267 U. S. 544, 551, quoted by respondent to the effect that membership in a fraternal beneficiary society is like marriage, means the *substantive* parts of that relation and contract. It does not render Indiana powerless to regulate *remedies* when both the member and the corporation get into an Indiana court, any more than Indiana is powerless to regulate the remedy of divorce in its own courts when parties sue for divorce in Indiana, simply because they were married in New York.

Respondent admits at page 11 that: "Doubtless she (Petitioner) came to Indiana in good faith," but it ar-

gues "forsooth" that giving her the protection of the Indiana remedial statute will encourage states to pass long limitation statutes and encourage plaintiffs to go there to sue. The answer is that all a company has to do is to stay out of a state whose remedies it does not like, and refrain from doing business therein, and then its courts cannot acquire jurisdiction over the company.

Contrary to Respondent's attempted distinctions, the cases we cited, *Kernel* v. *Nat. Life & Acc. Ins. Co.* (1938), 105 Ind. App. 181, 182, 184-185, 12 N. E. (2d), *transfer denied*; and *Rutherford* v. *Prudential Ins. Co.* (1905) 34 Ind. App. 531, 535, 536, 73 N. E. 202, were not "issued in Indiana," as Respondent argues, so far as the cases show. The Indiana court in both cases considered this fact too immaterial to mention in its construction of the three year statute, *Sec.* 39-1713, *Burns* 1933. However, the *Rutherford* case seems to indicate that the New Jersey company issued the policy from its New Jersey office to insured while she was a resident of Kentucky—at least the transactions in question occurred in Kentucky (34 Ind. App. at pp. 535-536)—after which insured's administrator sued the company in Indiana where it was doing business and hence subject to process of an Indiana court.

Likewise respondent makes no answer to this Court's decision under this Indiana statute in *Metropolitan Casualty Ins. Co.* v. *Brownell* (1935) 294 U. S. 580, 55 S. Ct. 538, except to remark that the contract was "issued in Indiana and to be performed there" (Brief 16). These facts appear only incidentally, if at all, in the *Brownell* opinion and was *not the basis of the decision.* Respondent ignores, because it cannot answer, the basis of this Court's decision in that case, namely, that the three-

year statute applies Indiana's *public policy* to *all* foreign insurance companies as a *class* (294 U. S. at pp. 585-586).

Likewise ignored by Respondent is the fact that the Circuit Court of Appeals' opinion goes contrary to this Court's opinion in the *Brownell* case by converting the same statute into a classification of *contracts* and contract *holders* instead of *companies*, making the statute turn on such details as whether plaintiff-petitioner's contract "matured" before she became an Indiana citizen and denying her the *statute's* protection and remedial right *on that fine distinction*, while at the same time the Circuit Court of Appeals' opinion totally *ignores* this Court's *Brownell* opinion, though the case was cited by us and came up from that court (R. 76).

Therefore it is respectfully submitted that the Petition for Certiorari should be granted.

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1058

LILLIAN BLEWEISS SMITH,
Petitioner,

vs.

COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA,
Respondent.

OBJECTIONS TO GRANTING WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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INACCURACIES IN PETITIONER'S STATEMENT.

---

1. In petitioner's statement of the matter involved (p. 2), she says that respondent-defendant is a New York insurance corporation doing business in Indiana (R. 74, 28). On the contrary, respondent is a mutual association not organized under the general insurance laws of New York, but under Article VI which covers cooperative and assessment plans. (Testimony of Hubbard, Unprinted Rec. p. 64, ls. 13-17.)

2. That defendant transacted business in Indiana is stoutly denied and evidence in support of its position in that respect shows that all business was transacted by mail,

no agents employed or solicitation of business anywhere; that all applications were passed on at the Home Office in New York and certificates mailed from there and all claims paid there. (Testimony of Hubbard, Unprinted Rec. p. 64, l. 21; pp. 60 to 66, l. 6.)

3. Petitioner says (Brief, p. 11): "the District Court dismissed the original complaint on the ground that the plaintiff had become a resident (of Indiana) after the action accrued. The policy had matured before it was in any way effected by the laws of Indiana." This statement calls for a disentangling operation. The court did not dismiss the case on the ground that the plaintiff had become a resident after the action accrued, but on the contrary, refused to let the fact of her residence interfere with or prevent the dismissal, which he felt constrained to make because of the one year limitation. Moreover, the court did not use italics in the opinion, as petitioner has copiously and frequently done, and in some instances not accepting responsibility for the italics, notably on pages 14 and 15 of the brief; quoting from *Metropolitan Casualty Co.* v. *Brownell*, 68 Fed. (2d) 481, on page 17; quoting Section 39-1710, Burns Indiana Statutes, on page 21; quoting 37 C. J. 731, on page 23.

Questions Presented.

(Petitioner's points are here discussed in what is deemed to be the order of their importance rather than the order in which they have been presented.)

I.

Petitioner's second point is that the decision deprives her as an Indiana citizen of the protection of the three year statute and to that extent discriminates against her as such citizen. This contention is unsound because:

(a) The Indiana Act was not intended, nor can it be

ed to reach contracts (1) not made by an Indiana
ıy, (2) not issued in Indiana, and (3) not to be per-
co in Indiana.
co *Home Ins. Co.* v. *Dick,* (1930) 281 U. S. 397; 74
fo L. Ed. 926.
General Am. Ins. Co. v. *Carter,* (1944) 222 Ind. 557.

To uphold this contention would mean striking
ı valid contract made in New York and enforceable

d *Hanna* v. *Comm. Trav. Mut. Accid. Assn.,* (1923)
tl 236 N. Y. 571; 142 N. E. 288.
Savery v. *Comm. Trav. Mut. Acc. Assn.,* (1933)
263 N. Y. S. 118.
Nigro v. *Comm. Trav. Mut. Acc. Assn.,* (1945)
47 N. Y. S. (2d) 169.

Petitioner had no rights in respect to this contract
the Insurance laws of Indiana. It was executed in
ork and expressly provides that it is to be governed
laws of New York and to be performed, that is,
nt made in New York. The domicile of a member
beneficiary is immaterial.
Modern Woodmen of America v. *Mixer,* (1925) 267
U. S. 544; 69 L. Ed. 783.

The alleged right of the Indiana citizen was not
respect to an Indiana contract, for there was no
ıa element expressed, implied or contemplated in
rtificate of membership held by the decedent.
Home Ins. Co. v. *Dick,* (1930) 281 U. S. 397; 74
L. Ed. 926.

Petitioner was not a citizen of Indiana at the time
ıe contract was executed in New York, (2) the alleged
nt occurred in Georgia, (3) when the member died
orgia, and (4) she was at all three times above enumer-
ı resident and citizen of Pennsylvania.

(f) Petitioner does not show that the Supreme Court of Indiana has construed the three year limitation provision to apply to contracts not made in Indiana. The District Court and the Circuit Court of Appeals were therefore at liberty to place their own construction upon it.

MacGregor v. *State Mutual Life Assurance Co.*, (1942) 315 U. S. 280; 86 L. Ed. 846. See same case below 119 Fed. (2d) 148.

II.

Petitioner contends that the decision strips Indiana of all power to enforce her own public policy of protecting her citizens suing in her own courts with respect to the subject of limitations. The decision does not state the rule of comity in such broad or comprehensive terms. Indiana is still at liberty to make and enforce her own statutes with respect to (a) contracts made in Indiana; (b) contracts to be performed in Indiana; (c) where there is no contractual limitation set up by the parties, valid in the jurisdiction where the contract was made.

Home Ins. Co. v. *Dick*, (1930) 281 U. S. 397; 74 L. Ed. 926.

III.

Petitioner's first point is that the decision of the Court of Appeals is in conflict with *Equitable Life Assurance Society* v. *Kellemen, Ind. Sup. Ct.*, November 8, 1946, 69 N. E. (2d) 244. There is no such conflict for the reasons:

(a) The Kellemen decision stated the conditions precedent to maturing the "cause of action," that is, what must be done before an action may be maintained. The decision of the Court of Appeals in the instant case says the right to make a claim under the policy matured at the death of the insured. There is a clear distinction between

the time when a right accrues and the time when an action may be commenced to enforce it.

May v. *The State,* 133 Ind. 567 (1893).

"Actions" 1 Am. Jur. p. 405, sec. 3.

(b) If respondent is right concerning the first two propositions herein, it is immaterial when the policy matured or the cause of action matured, as in any event the action was required to be commenced within one year from the date of the accident.

IV.

Notwithstanding the foregoing contentions of the petitioner, the District Court reached the correct result in dismissing the action. The evidence shows that respondent conducted its business exclusively by mail and therefore it is not subject to service in other jurisdictions than that of its domicile.

Minn. Comm. M. Assn. v. *Benn,* (1923) 261 U. S. 140; 67 L. Ed. 573.

SUMMARY OF ARGUMENT.

1. A contract limitation, valid where made, is enforceable elsewhere.

2. Decedent was a member of a mutual society, not the holder of an insurance policy.

3. To respect the contract limitation is not to violate the public policy of Indiana.

4. There is no conflict between the decision of the Circuit Court of Appeals affirming the District Court and applicable decisions of Indiana.

5. Respondent was not doing business in Indiana.

ARGUMENT.

Petitioner cannot prevail unless she can establish that because she moved to Indiana before she commenced suit, she has rights there that she did not have where the contract was made and to be performed; that she is conscious of this burden is evidenced by her stressing the point so vigorously. Or, what she asks is that a court sitting in Indiana delete from a New York contract a provision that stands in her way. If she fails in this, all her other contentions go for naught.

But the one year limitation did not always stand in her way, because respondent denied liability on the merits 5 months before the year expired, to wit, on March 27, 1934 (Ex. P, Rec. 57) again on April 4, (Ex. T, Rec. 59) and yet again on May 8, (Ex. V, Rec. 61).

This Court has already disposed of petitioner's main contention in *Home Ins.* v. *Dick*, 281 U. S. 397. Here the Court considered a policy contract made and admittedly valid in Mexico, and a one year limitation therein for commencing action upon it. Dick, a citizen of Texas, commenced the suit in a Texas court to recover on the Mexican policy. The company was not admitted in Texas and had no agent there, and did not transact business therein. The Home Insurance Co. and others were garnisheed, and thus the Texas courts claimed jurisdiction *in rem*. Texas had a two year limitation forbidding a shorter one, as against the Mexican contract for one year.

It is important to note that this Court said that it was immaterial whether the contract limitation related to the remedy or the substance (petitioner herein claims that it

is part of the remedy) and, speaking by Justice Brandeis, the Court said:

> "However characterized, it is an express term in the contract of the parties by which the right of the insured and the correlative obligation of the insurer are defined. * * * If, on the other hand, the (Texas) statute is applied to the contract, it admittedly abrogates a contractual right and imposes liability, although the parties have agreed that there should be none.
>
> "The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked. Nor does it govern only the remedies available in the Texas courts. It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts. As construed, it also directs the disregard in Texas of contractual rights and obligations wherever created and assumed; and it commands the enforcement of obligations in excess of those contracted for. * * *
>
> "A state may, of course, prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the state and their performance would violate its laws. But, in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. Neither the Texas laws nor the Texas courts were invoked for any purpose, except by Dick in the bringing of this suit. The fact that Dick's permanent residence was in Texas is without significance."

The Court also dealt with the question of public policy and decided that the case was not one for the application of the public policy of Texas as prescribed in its statute of

limitations, pointing out that the Mexican corporation never was in Texas, and that none of the defendants ever invoked the aid of the Texas courts or the Texas laws; that the garnishees were brought in by compulsory process. The Court said:

> "Neither has asked favors. They ask only to be let alone."

Moreover, the Court finally demolished the theory by saying:

> "But in Texas, as elsewhere, the contract was subject to its own limitations."

There is some analogy between this decision and that of the Supreme Court of Indiana in *General American Life Ins. Co.* v. *Carter*, (1944) 222 Ind. 557. The Indiana court refused to entertain for a non-resident of Indiana an action on an insurance contract made and to be executed in a foreign state, where service was had on the Commissioner of Insurance. The Court refused to allow the plaintiff to take advantage of this Indiana statute providing for service on a foreign insurance company found within the state.

The Contract Was Made in New York to Be Performed There and Sanctioned by the Laws and Decisions of That State.

Hanna v. *Comm. Trav. Mut. Accid. Assn.* (1923), 236 N. Y. 571; 142 N. E. 288, holds the contract limitation is valid.

As this Court pointed out in the Dick case, here was a contractual agreement concerning the time for beginning action, and being valid in New York, it must be recognized elsewhere.

Moreover, petitioner ignores the distinction between membership in a mutual assessment association, such as

this, and an arms-length, as it were, policy of insurance. One who purchases a policy of insurance does not ordinarily become a part of the corporation which grants it (there is some right to a limited extent, such as voting, in mutual companies).

The difference between purchasing a policy of insurance, a potential chose in action, and becoming a member of a mutual society or association, is not a novelty in this Court. In *Modern Woodman of A.* v. *Mixer,* (1925) 267 U. S. 544; 69 L. Ed. 783, a society organized in Illinois issued in South Dakota a certificate of membership to a resident of that state. The question was as to the validity of a by-law adopted at the corporate domicile. Suit was commenced on this certificate in Nebraska, and the question immediately presented was whether the by-law valid in Illinois was valid elsewhere.

Mr. Justice Holmes disposed of the case in favor of the society, epitomizing the whole doctrine in language which we shall not attempt to paraphrase. He said:

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law is elaborated in *Supreme Council R. A.* v. *Green,* 237 U. S. 531. * * * The act of becoming a member is something more than a contract,—it is entering into a complex and abiding relation, and as marriage looks to domicile, membership looks to and must be governed by the law of the state granting the incorporation. We need not consider what other states may refuse to do, but we deem it established that they cannot attach to membership rights against the company that are refused by the law of the domicile. It does not matter that the member joined in another state."

Respondent's position is stronger, because Smith made application for membership in New York City.

So petitioner must overcome the doctrine and language of this Court in two controlling cases which completely encompass it from every approach undertaken by the petitioner. These decisions establish the error of her claim.

No Public Policy of Indiana Is Violated.

The petitioner argues that the decision below "lays down the rule of comity so broadly that Indiana is powerless to enforce her public policy against a contractual limitation, in her own courts, simply 'because the contractual limitation is valid in New York, the *loci contractus'*, as stated in the opinion below (R. 76, bottom)". (Brief, p. 21.)

It is submitted that petitioner's quotation from the decision below is taken from its context which includes the further pertinent observation of the court, to-wit:

> "As we have already noted, the contract had its origin in New York and was issued to a citizen of Pennsylvania. The insured was injured and died in Georgia. Nowhere does it appear that the parties to this contract ever contemplated performance or that performance was to be had in Indiana. *In such a situation* we think it is clear that we must look to New York and not Indiana law." (Our italics.)

In other words, the Circuit Court of Appeals' refusal to apply in Indiana a statutory prohibition against the contractual limitation involved herein was not only because such contractual limitation was valid in New York, the *loci contractus*, but also because there was not a single Indiana element in the entire situation which would afford jurisdiction for the application of the Indiana law.

But, petitioner does not cite an Indiana case which attempts to apply the three year limitation to a contract made outside the state and not to be performed herein even

though sued upon in Indiana. She therefore exhibits the fatal weakness discussed in *MacGregor* v. *State Mutual Life Insurance Co.*, (1942) 315 U. S. 280, affirming 119 Fed. (2d) 148, which holds that in the absence of such a showing, the District Court and Circuit Court of Appeals were at liberty to place their own construction on this statute.

Petitioner is insisting that she may call upon the courts of Indiana to modify her contract made in New York to be performed there with a then citizen of Pennsylvania. All this, forsooth, is upon the idea that before she commenced suit she moved to Indiana, which is equivalent to contending that she had a right to survey the laws of the entire United States and shop around for the most favorable one. Doubtless she came into Indiana in good faith, but if her theory is to be upheld, it will open the door to as much migration of insurance claims as the notorious divorce situation has developed. To uphold this contention would be to sanction in advance and unwittingly invite action by some litigation-minded state to pass a statute of limitations providing that an action may be brought on an insurance policy or claim within twenty years after the alleged loss and that there shall be no defense that the action has been barred by a contract limitation valid in the state where the contract was made. No less absurd and unsound is the philosophy of petitioner's position.

But the petitioner urges that the question of limitations, being merely a matter of remedy, is governed by the law of the forum, and cites *Karvalsky* v. *Becker*, 217 Ind. 524 in support of this universal rule. Of course, it must be always kept in mind that the Karvalsky case presented a situation wherein the society was an Indiana corporation, and of course, the power of the Indiana Legislature to regulate the activities of such a corporation is practically unlimited.

However, Justice Brandeis disposed of this question in *Home Ins. Co.* v. *Dick*, where he said the Texas statute would command the enforcement of obligations in excess of those contracted for.

The learned District Judge appreciated this point and said in his opinion ~~dissenting~~ dismissing this action (R. 30):

> "When closely analyzed section 39-1713 is not a statute of limitations in the orthodox sense. It does not provide that actions on any insurance policy wherever issued shall not be barred in Indiana within a period of three years after the cause of action has accrued notwithstanding any provisions in the policy to the contrary. Although its effect is to enlarge the time to sue where the contract of insurance contains a condition not to sue for a period of less than three years, the statute goes to the validity of such a provision and not to the remedy—that is, access to the courts,—as to actions on *any* contract of insurance wherever made or issued. Surely, Indiana does not presume to invalidate contractual provisions of a contract which neither was made in Indiana nor was to be performed there and which never had any connection with the state or its inhabitants until after the action accrued."

Moreover, he expressly limited the application of the Indiana statute to policies "issued in Indiana", citing the *Dick case.*

Certainly it is axiomatic that before such a prohibitive statute can be applied, it is necessary that there be some activity within the State of Indiana in connection with the issuance of the contract or the place of performance. As respondent has already pointed out, p. 7, *supra,* the statute itself can only be construed to apply to policies issued within the State of Indiana.

Subject only to restrictions laid upon it at its domicile, an insurer doing business in other states may have as many valid contracts as the several states approve. There may

be no two alike, and under the doctrine of the *Dick case* the courts of each state must uphold the validity of any such contract valid where made.

It could not be said that if a claimant moved from one of those states to another where this rule applied, she could ignore the contract limitation that was valid where and when made in favor of a more favorable one in the forum she shopped around to find. The idea of avoiding a contract limitation fairly entered into by changing citizenship after the contract became a claim may be ingenious, but so far it is not observed that it has obtained the sanction of any court. The District Court stated the fallacy of petitioner's position in language quoted above and upon which respondent would not attempt to improve.

In *Henning* v. *Hill,* 80 Ind. App. 363 (1923), the court permitted an action on a contract made and valid in Illinois, a like contract not being permitted to be made in Indiana. No public policy of Indiana was violated, the Court said, and the doctrine of comity was applied.

Respondent has no quarrel with the rule that the law of the forum is ordinarily controlling as to the limitation period applicable. But the Indiana statute which petitioner seeks to have enforced against the respondent here is not a statute of limitations, but is a statute which prohibits certain contractual provisions in insurance contracts (*Home Ins. Co.* v. *Dick*). There is a statute of limitations in Indiana applicable to actions on insurance policies which provides that actions on written contracts must be brought within ten years. Petitioner is not seeking to have this statute applied under the general rule stated in the Karvalsky case, but is seeking to apply another Indiana statute which is not a statute of limitations and does not stipulate the period within which actions must be begun, but is a statute which prohibits certain provisions in insurance policies which are issued within the State of Indiana.

III.

There is no conflict between the decision of the Supreme Court of Indiana in *Equitable Life Assurance Society* v. *Kellemen*, 69 N. E. (2d) 244, and the ruling of the District Court and the decision of the Circuit Court of Appeals, 158 Fed. (2d) 65. Regardless of language which may be lifted from its context in either opinion, it gets down to this:

In the Kellemen case, the point was that filing of proofs of death was a condition precedent to maintaining the action regardless of when the claim arose. The learned Court of Appeals said that the right of action arose at the death of the member. The right or cause of action and the right to prosecute it are two different things. The Supreme Court of Indiana said so in *May* v. *The State*, 133 Ind. 567 (1893). The question was whether an action against the state was timely brought. The court said:

> "We think it quite clear that there may be a claim or demand without any right to sue for its recovery. It has been held by this court that a claim may accrue at one time, and a right to sue for its recovery may accrue at another and different time. *Indianapolis, etc., R. W. Co.* v. *Center Township*, 130 Ind. 89."

There is nothing in the opinion of the Supreme Court of Indiana or that of the Circuit Court of Appeals to indicate that either court does not subscribe to the rule that the right to a claim arises or "matures" at the death of a member, and that the right to maintain an action thereon arises or "matures" when certain conditions precedent, such as filing proofs of death, have been complied with.

Under the facts in the two cases, which are wholly dissimilar, it is apparent that the courts were talking about two different things, one about the maturity of the claim, and the other about the maturity of the cause of action.

The Cause Should Have Been Dismissed Because Respondent Was Not Doing Business in Indiana.

It will be noted that in the memorandum opinion, the District Court found that the facts would have required a dismissal of the action for lack of jurisdiction under the authority of *Minn. Comm. M. Assn.* v. *Benn,* (1923) 261 U. S. 140, but for the decision of the Supreme Court of Indiana in *Karvalsky* v. *Becker,* 217 Ind. 524. This was upon the fact that in the *Karvalsky case,* the society mailed its certificate to West Virginia to a member residing there. The District Court erroneously construed this isolated fact to be the basis of the decision of the Supreme Court of Indiana, whereas actually the court found that the society had members in West Virginia who solicited other members in that state, collected their membership dues, deducted commissions and remitted the balance to the Home Office in Indiana. This, we submit, was doing business in West Virginia regardless of how the certificate of membership was forwarded or reached the member. There is no pretense that this record reveals that respondent ever had an agent or solicitor in Indiana or ever collected money there or transacted any business whatsoever. True, petitioner claims that by sending a representative to Gary after the claim had been made and executing there an autopsy agreement months after the death of the member constituted doing business in Indiana. This is so far fetched that it needs no particular comment. Isolated or casual acts are always treated as not within the definition of doing business. See *Sasnett* v. *Iowa State Comm. Mens Assn.,* (1937) 90 Fed. (2d) 514.

So, under the authority of *Letulle* v. *Scofield,* (1940) 308 U. S. 415; 84 L. Ed. 355, respondent submits that the District Court actually had two good reasons for dismissing

the case, though he recognized only one. The other is now offered here.

Observations on Certain Cases Cited by Petitioner.

Among the cases not heretofore discussed herein, petitioner cites several construing the Indiana statute forbidding less than three years limitation on Indiana contracts.

So far as appears in *Kernel* v. *National Life & Accident Ins. Co.*, 105 Ind. App. 181, and *Rutherford* v. *Prudential Insurance Co.*, 34 Ind. App. 531, the contracts of the foreign insurance companies were issued in Indiana.

Metropolitan Casualty Insurance Co. v. *Brownell*, 68 Fed. (2d) 481, the decision of the Seventh Circuit Court of Appeals, was set aside by the granting of a certiorari from this Court and the decision rendered herein in 284 U. S. 580; 55 Sup. Ct. 538. It involved a contract of a New York corporation issued in Indiana and to be performed there.

A. B. v. *C. D.*, (D. C. Pa. 1940) 36 F. Supp. 85; affirmed, 123 Fed. (2d) 1017; certiorari denied, 314 U. S. 691, is interesting because it is a holding that since there was no cause of action for breach of promise in New York where the woman lived, she could not acquire one under the laws of Pennsylvania. The Court decided the case on the ground that there was no right of action in New York or Pennsylvania, and then added some dictum concerning the public policy of Pennsylvania.

Union Trust Co. v. *Grosman*, (1918) 245 U. S. 412; 38 Sup. Ct. 147; 62 L. Ed. 368, holds that a married woman residing in Texas, being forbidden there to become a surety so as to involve her separate property, could not journey to Illinois and there make such contract. The

ed States Court sitting in Texas refused to enforce contract against her and was affirmed by this Court.

laxon v. *Stantor Electric Mfg. Co.*, (1941) 313 U. S. 61 Sup. Ct. 1020; 85 L. Ed. 1477, holds that the Court , in its discretion, allow or refuse to allow interest, ending upon the policy of the forum. It does not in- e a contract obligation to pay interest.

he quotation (Brief p. 23) from 37 C. J. 731, "Limita- s of Actions", is not applicable to a contract stipula- limiting the time to begin an action.

fter all, as Mr. Justice Holmes said in the *Mixer* case, nbership looks to and must be governed by the laws of state granting the incorporation. Therefore, petitioner rawn into New York and the law of that state upholds respondent in all respects.

Respectfully submitted,

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